actions. "Because most plaintiffs find litigation outside of a class action impractical and uneconomical, the vast majority of investors will be left with only federal remedies—the express remedies created by the [1933 Act] and the remedies that the federal courts have implied under the [1934 Act]." Painter, *Responding*, 84 Cornell L. Rev. at 2.

SLUSA does not, however, make federal court the exclusive venue for all securities class actions. For instance, because SLUSA only preempts and makes removable covered class actions based on state law, class actions based on the 1933 Act may still be prosecuted in state court, and they cannot be removed to federal court either on federal question grounds (as has always been the case) or under SLUSA. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004) (dismissing for lack of appellate jurisdiction appeal of remand order in 1933 Act class action). SLUSA also contains a so-called "Delaware carve-out" provision exempting state law-based class actions in which the plaintiffs allege that corporate managers made misleading statements in order to obtain shareholder approval of a transaction.

> The Delaware carve-out was adopted because of concerns expressed by SEC Chairman Arthur Levitt ... and others, that *earlier drafts of the bills in both the House and the Senate threatened to dismember state corporate law by forcing claims involving breach of the fiduciary duty of disclosure to be filed in federal court.* For example, earlier versions of the bills probably would have preempted a class action, under Delaware law, against corporate directors for breach of the fiduciary duty of disclosure to shareholders in connection with a merger or other change-in-control transaction.

Painter, *Responding*, 84 Cornell L. Rev. at 67 n.355 (emphasis added).

The version of SLUSA Congress finally adopted preempts a precisely defined set of "covered class actions" in which "any private party alleg[es]" either "a misrepresentation or omission of a material fact in connection with

the purchase or sale of a covered security" or the use of "any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1); *see also* 15 U.S.C. § 77p(b).

The "in connection with the purchase or sale" language is "language that, at the time of SLUSA's enactment, had acquired settled, and widely-acknowledged, meaning in the field of securities law, through years of judicial construction in the context of § 10b-5 lawsuits." *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342-43 (11th Cir. 2002). *Accord Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002) ("The Supreme Court has clearly explained the meaning of this language in the context of SEC Rule 10b-5 and § 10(b)."); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith*, 395 F.3d 25, 34, 35 (2d Cir. 2005) ("The phrase has been extensively interpreted by the Supreme Court and the lower federal courts in the context of § 10(b) and Rule 10b-5" and "In enacting SLUSA, ... Congress was not writing on a blank slate; instead, it was legislating in an area that had engendered tremendous amounts of litigation and received substantial judicial attention").

Significantly, this Court's interpretation of that phrase in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), specifically held that the phrase does *not* include holders who "decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material." *Id.* at 737-38. "[T]he 'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). SLUSA's legislative history confirms the propriety of interpreting the phrase "in connection with the purchase or sale" the same in § 10(b) and SLUSA.

C. Holder claims were not part of the legislative bargain that produced SLUSA and are therefore not pre-empted by SLUSA, as the Second Circuit correctly concluded.

No one has seriously questioned Congress' focus in enacting SLUSA and the text of SLUSA itself, which sets forth Congress' findings, leaves no room for doubt:

> [S]ince enactment of [the PSLRA], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts; this shift has prevented that Act from fully achieving its objectives.

15 U.S.C. § 78a(2) & (3). Thus, Congress found "it is appropriate to enact national standards for securities class action lawsuits," "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995." *Id.* at § 78a(5). *See* 144 Cong. Rec. (Oct. 15, 1998) H11019-01, H11020 (Joint Explanatory Statement of the Committee of Conference) ("The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.") S. Rep. No. 105-182, 1998 WL 226714, at *9 (1998) ("This legislation is designed to address an unforeseen 'loophole' in the 1995 Private Securities Litigation Act, that has blocked that law from accomplishing its stated goal of reforming private securities litigation.").

SLUSA's objective of closing the "federal flight" loophole was the explicit understanding of the Act's proponents. "Only those suits traditionally filed in Federal courts would be affected by H.R. 1689, while those claims that historically have been pursued in State courts would be left undisturbed." 144 Cong. Rec. E1385 (July 22, 1998) (Rep. Fazio):

> [SLUSA preempts] only those class actions that have recently migrated to State court, while *leaving traditional State court actions and procedures solidly in*

> *place.* ... This legislation has been carefully crafted only to affect those types of class actions that are appropriately heard on the Federal level.

143 Cong. Rec. S10477 (Oct. 7, 1997) (Sen. Dodd) (emphasis added).

Accordingly, SLUSA was not the "federal power grab" that respondent and its *amici* make it out to be; Congress was concerned strictly with "returning to federal courts cases which until the 1995 Reform Act had always been heard in federal courts." 144 Cong. Rec. E1390 (July 22, 1998) (Rep. Eshoo).

Moreover, SLUSA's text and legislative history are as significant for what they *do not* say as they are for what they do say. SLUSA never mentions claims "in connection with" the *retention*—as opposed to the purchase or sale—of a security. Similarly, nowhere in SLUSA's legislative history are such state law claims ever mentioned. Any Congressional intent to preempt such claims is thus at best ambiguous. It is far more likely that Congress simply gave no thought at all to holder claims. Given that such suits are a relative rarity, given that they were clearly not the impetus behind the enactment of SLUSA, and given the legislative record's silence with respect to such claims, there is no reason to believe that holder suits played any part of the legislative bargain that produced SLUSA.

Moreover, though there may well be members of Congress who would like to eliminate holder claims entirely, it is far from certain that such a measure could win a legislative majority, particularly in view of the fact that at least some of SLUSA's supporters understood SLUSA to "leav[e] traditional State court actions and procedures solidly in place. ..." 143 Cong. Rec. S10477 (Oct. 7, 1997) (Sen. Dodd). It is anyone's guess how the legislative process might treat holder claims. Perhaps an elimination of state law holder claims would come at the price of granting holders a 10b-5 type remedy subject to the same kinds of restrictions as 10b-5 purchaser and seller claims. Or Congress might conclude that state law holder class ac-

tions do not present the same dangers as those class actions targeted by SLUSA and therefore do not warrant any Congressional action. Whatever bargain members of Congress might strike with respect to holder claims, it remains within that body's province—not the courts'—to decide the fate of holder claims, insofar as federal law is concerned.

Two rules of statutory construction also counsel against an interpretation of SLUSA which would preempt holder claims. First, "in all pre-emption cases, and particularly in those [where] Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The assumption applies not only "to the question whether Congress intended any pre-emption at all," but also "to questions concerning the *scope*" of an express preemption statute. *Id.* at 485 (emphasis in original) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 523 (1992) (where the Court "used a 'presumption against the preemption of state police power regulations' to support a narrow interpretation of such an express" preemption statute)).

Second, when doubts exist about Congress' intent to preempt state law, courts must err on the side of caution. "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). At the very least, SLUSA's text, its legislative history and these basic interpretive rules cast serious doubt upon the proposition that SLUSA preempts the state law claims of holders in connection with their retention of securities. Respondent and its *amici*

have offered no persuasive justification to overcome this logic.

II. HOLDER CLASS ACTIONS PRESENT THEMSELVES IN A VARIETY OF FACTUAL CONTEXTS UNDER A VARIETY OF STATE LAW THEORIES

Class action holder claims under state law have presented themselves in a variety of forms and factual circumstances. For instance, in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), the president and chairman of Newport Steel Corporation rejected another steel company's merger offer which would have been highly profitable to Newport stockholders. Before the month was out, he had sold for double market value his 40% holdings in Newport to a third company which also desired to gain control of Newport. After finding themselves "without federal remedies," the *Birnbaum* plaintiffs secured "recovery in a cause of action based on state law. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738 n.9 (1975) (citing 3 L. Loss, Securities Regulation 1469 (2d ed. 1961)).

Perhaps the most common context in which holder claims arise is when holders are induced "not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material." *Id.* at 737-38. That was the case in *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982). W.T. Grant Company filed for bankruptcy with well over a billion dollars in recorded liabilities. Prior to that time, Grant had offered its shareholders a misleadingly optimistic picture of the company's financial position at a time when the company's actual position continued to deteriorate. The class included "persons who merely *held*, rather than *purchased*, Grant securities during the class period," who asserted common law fraud and breach of fiduciary duty claims. *Id.* at 68 (emphases in original). The holders in *Weinberger* shared in the class recovery strictly by virtue of their state law claims. In a

comprehensive opinion by Judge Henry Friendly for the Second Circuit, the court upheld a class settlement of those holder claims. *Id.*

California is the most recent state to recognize holder claims under state law. *Small v. Fritz Cos.*, 65 P.3d 1255 (Cal. 2003). In *Small*, the plaintiff alleged "that defendant corporation and its officers sent its stockholders a fraudulent quarterly financial report that grossly overreported earnings and profits. Plaintiff alleged that when the fraud was discovered, the price of the corporate stock dropped precipitously, causing injury to stockholders like himself." *Id.* at 1256. Small filed "a class action on behalf of all shareholders in Fritz 'who owned and held Fritz common stock ... in reliance on defendants' material misrepresentations and omissions ....'" *Id.* at 1258. Small asserted claims for common law fraud and negligent misrepresentation, and for violations of California statutory provisions "which codify the common law actions for fraud and deceit." *Id.*

The California supreme court rejected the defendants' arguments against the allowance of holder claims:

> California has long acknowledged that if the effect of a misrepresentation is to induce forbearance—to induce persons not to take action—and those persons are damaged as a result, they have a cause of action for fraud or negligent misrepresentation. We are not persuaded to create an exception to this rule when the forbearance is to refrain from selling stock. This conclusion does not expand the tort of common law fraud, but simply applies long-established legal principles to the factual setting of misrepresentations that induce stockholders to hold on to their stock.

65 P.3d at 1257. The court was careful to limit the availability of such a claim "to stockholders who can make a bona fide showing of actual reliance upon the misrepresentations," *id.*, but expressed no view as to the propriety of certification of the case as a class action because the

trial court had not yet "ruled on the matter." *Id.* at 1256 n.1.

A case involving strikingly similar holder allegations to the present case is also pending before this Court on a petition for a writ of certiorari. *Disher v. Citigroup Global Markets, Inc.*, 419 F.3d 649 (7th Cir. 2005), *petition for cert. pending*, No. 05-776 (U.S. filed Dec. 15, 2005). The primary difference between *Disher* and *Dabit* is that Disher's complaint actually excluded all purchasers and sellers in his complaint; he defined his class as one consisting exclusively of non-trading shareholders, as the Seventh Circuit recognized. *Id.* at 651. The Seventh Circuit, in conflict with the Second Circuit's *Dabit* decision, held that SLUSA preempts such claims.

A final group of holder class actions which the Court should consider are cases involving the mutual fund scandal which surfaced in 2003. Many of those cases have been consolidated in a multidistrict proceeding currently pending before three district judges in the District of Maryland. *See In re Mutual Funds Inv. Litig.*, 384 F.Supp.2d 845 (D. Md. 2005). Those cases involve holders whose mutual fund holdings were diluted by arbitrage practices known as "market timing" and "late trading." *Id.* at 852 n.1 (describing both practices). Another group of mutual fund class actions involving holder claims of market timing are also currently pending before the Court on a petition for a writ of certiorari. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), *petition for cert. pending*, No. 05-409 (U.S. filed Sept. 29, 2005). In those cases, the holder-plaintiffs have asserted a variety of state law theories of recovery against the defendant Funds and their managers for permitting market timing and late trading in the funds, including breach of contract, breach of fiduciary duty and negligence.

CONCLUSION

Holder claims, unlike the state law claims which SLUSA was designed to preempt, are not mere 10b-5 claims recast as state law claims. They have not been "traditionally" litigated in federal court or under federal law. To the extent they are available at all, they have only existed under state law. Whether such claims should be permitted is a question either for the States; whether they should be preempted is a question for Congress. SLUSA does not preempt such claims. The decision below should accordingly be affirmed.

Respectfully submitted,

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No. 04-1371

DEC 16 2005

In The
Supreme Court of the United States

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself
and all others similarly situated,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR IJG INVESTMENTS AND IRLYS GUY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities?

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INTEREST OF *AMICUS CURIAE* IJG INVESTMENTS AND IRLYS GUY

On June 7, 2002, *amicus curiae* IJG Investments Limited Partnership and Irlys Guy (collectively "the IJG Group")[1] filed a complaint in Minnesota state court. The IJG Group asserted state law claims alleging that, as customers of Merrill Lynch & Co., Inc. ("Merrill" or "Petitioner"), they were overcharged for the research that Merrill provided. On July 3, 2002, Merrill removed the case to the United States District Court for the District of Minnesota, alleging both that the IJG Group's state law claims were preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, and that federal diversity jurisdiction exists. On November 4, 2002, the Judicial Panel on Multi-District Litigation entered a conditional order transferring this case to the Southern District of New York and assigned it to the Honorable Milton Pollack, Senior District Judge, for coordinated proceedings with a number of actions, including the case filed by Respondent Shadi Dabit. On April 10, 2003, Judge Pollack dismissed the IJG Group's complaint, in an order that included the dismissal of Shadi Dabit's claims, finding that SLUSA preempted the claims. The IJG Group and Dabit each appealed the dismissal of their separate claims to the United States Court of Appeals for the Second Circuit.

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[1] Pursuant to S.Ct. Rule 37.6, *amicus curiae*, IJG Investments and Irlys Guy, state that no other persons or entities made any monetary contribution to the preparation or submission of this brief. Counsel for IJG Investments and Irlys Guy wholly authored this brief.

The Court of Appeals coordinated briefing and argument on the two appeals.[2] On January 11, 2005, the Second Circuit issued an opinion ruling on both Respondent's and the IJG Group's appeals as to each case, affirming the district court in part and vacating and remanding in part. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 34 (Sep. 27, 2005). The Second Circuit held that this Court's ruling in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), "applies as a limit on SLUSA's 'in connection with' requirement such that SLUSA does not preempt claims that do not allege purchases or sales made by the plaintiff or the alleged class members." *Id.* at 28. With respect to the IJG Group's allegations, the Second Circuit held that the IJG Group's commissions-based claims were preempted by SLUSA because "they necessarily involve allegations of a purchase or sale of securities 'in connection with' this alleged misconduct." *Id.* at 48. However, the Second Circuit determined that SLUSA does not apply to claims relating to flat annual fees paid for Merrill's services. *Id.* at 48, 49 ("An annual fee for services is paid whether or not the customer transacts on the account, and the misrepresentations inherent in the alleged nonperformance and statutory violations therefore do not necessarily 'coincide[] with' a securities transaction.") (citations omitted). The Second Circuit vacated the lower court's dismissal in this regard, with instructions that the district court "grant IJG's motion for remand as to so much of the

[2] Dabit and the IJG Group submitted separate briefs.

claim as seeks recovery on behalf of a putative class of those who paid annual fees." *Id.* at 50; *see also id.* at 28.[3]

Merrill filed the petition now before this Court only with respect to the Second Circuit's ruling in Dabit's case. The IJG Group submits this brief as *amicus curiae* in support of Respondent.

The Petition before this Court involves the extent to which SLUSA preempts class actions brought under state law where those actions do not allege that class members purchased or sold particular securities. The question presented turns on this Court's interpretation of SLUSA's "in connection with" the purchase or sale of a covered security language and whether this Court's decision in *Blue Chip Stamps* applies to the interpretation of the scope of SLUSA's preemption of private class action claims. Although this case arises before the Court in the context of whether SLUSA preempts claims of "holders" of securities, the answer can affect other claims, including the claims that the IJG Group asserted against Merrill. Accordingly, the IJG Group submits this brief as *amicus curiae* in support of Respondent's position. Petitioner and Respondent both consented to the filing of *amicus* briefs in support of either party. *See* Consent by Respondent, filed Oct. 17, 2005 and Consent by Petitioner, filed Oct. 18, 2005.

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[3] The Second Circuit dismissed Shadi Dabit's "holding" claims as pleaded, concluding that the "'holding' class as defined includes purchasers and thus that the putative class action includes allegations triggering SLUSA preemption." *Dabit*, 395 F.3d at 44. The Second Circuit vacated the lower court's ruling and remanded for dismissal without prejudice so that Dabit may replead. *Id.* at 28.

SUMMARY OF ARGUMENT

Congress enacted SLUSA for a specific purpose: to close the "federal flight" loophole that resulted in private plaintiffs avoiding the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, by filing class actions in state court. Congress addressed this specific problem in a specific way, by forcing class action securities claims by private litigants into federal court. Contrary to the arguments made by Merrill, applying *Blue Chip Stamps*' purchaser-seller requirement in interpreting SLUSA is supported by both case law and statutory construction, particularly given SLUSA's express language and purpose. *Blue Chip Stamps* acts as a limit to plaintiffs' pursuit of claims under the federal securities laws, the very claims that Congress wants in federal court. However, nothing in SLUSA's language suggests that Congress sought to use SLUSA to go beyond eliminating the federal flight loophole by preventing private plaintiffs from pursuing claims that *Blue Chip Stamps* and federal law had left for the states.

ARGUMENT

I. SLUSA'S PREEMPTION IS LIMITED AND DESIGNED TO EFFECTUATE THE PURPOSES OF THE FEDERAL SECURITIES LAWS.

In 1995, Congress passed the PSLRA to address perceived problems with class action claims brought by private litigants under federal securities laws in federal court. The PSLRA included, among other things, stringent pleading standards for federal securities claims in federal court. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith*, 332 F.3d 116, 122 (2d Cir. 2003). To avoid PSLRA's federal

requirements, some private litigants migrated to state court, seeking to take advantage of more favorable state laws. Congress enacted SLUSA for a specific purpose: to close the perceived loophole in enforcement of the PSLRA by making federal courts the exclusive venue and federal law the exclusive source of remedy for certain types of class action claims. *See Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 189 F. Supp. 2d 14, 16 (S.D.N.Y. 2001) ("Congress passed SLUSA in order to prevent plaintiffs from bringing traditional securities actions in state courts."); *accord Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 124 (2d Cir. 2003); *French v. First Union Sec., Inc.*, 209 F. Supp. 2d 818, 823 (M.D. Tenn. 2002).

When Congress sought, through SLUSA, to attack this loophole, it used a scalpel not a sword. Instead of broadly preempting state law, Congress specifically limited SLUSA to the kind of litigation it wanted in federal court: class actions by private plaintiffs alleging claims in connection with the purchase or sale of a "covered security." *See* 15 U.S.C. § 77p(b) and 78bb(f)(1). SLUSA is not, nor was it intended to be, a blanket immunity from suit under state statutes or common law, applicable to any complaint against a brokerage house. Rather, SLUSA addresses a specific problem in a specific way, requiring a specific subset of claims to be filed in federal courts under federal law in federal procedure.

To accomplish this goal, Congress chose to focus on a procedural matter, and did not choose to broadly preempt state law. *See Prof'l Mgmt. Assoc. Inc. Employees' Profit Sharing Plan v. KPMG L.L.P.*, 335 F.3d 800, 803-04 (8th Cir. 2003), *cert. denied*, 540 U.S. 1162 (2004) ("[SLUSA] simply establishes a procedural rule regarding the filing of

class action lawsuits alleging securities fraud" so no retroactivity analysis was warranted). Thus, SLUSA applies, by its terms, only if a private plaintiff alleges that the claims in the complaint should be adjudicated using the class action procedural device. *Spielman*, 332 F.3d at 123-24. All other things being equal, two plaintiffs could assert the same state law claims, but if one of the plaintiffs includes class procedural allegations, SLUSA might apply. The other plaintiff, however, would be free to pursue state remedies. The "uniformity" that Congress sought to achieve through SLUSA is somewhat limited in the sense that it relates only to private plaintiffs' class action claims that would be governed by the PSLRA if they were filed in federal court, *i.e.*, claims that private class action plaintiffs have standing to assert as purchasers and sellers of securities under established federal law.

Just as Congress could have provided that SLUSA applies broadly to preempt state law irrespective of whether claims are brought individually or on behalf of a class, Congress could have also provided that SLUSA's preemption applies to a private plaintiff irrespective of whether a purchase or sale of securities is alleged. Consistent with its specific, limited goal of closing the federal flight loophole, Congress placed within SLUSA the identical limitation it had placed in other federal securities laws: SLUSA is only applicable to private claims alleging a fraud or misrepresentation "in connection with" the purchase or sale of securities. *See* 15 U.S.C. § 77p(b) and § 78bb(f)(1). As a matter of statutory construction, Congress is presumed to have known how the language it selected applies to a private plaintiff, as interpreted by *Blue Chip Stamps*. *See, e.g., Riley v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 292 F.3d 1334, 1342 (11th Cir. 2002), *cert. denied*, 537 U.S. 950 (2002). As several courts have noted, "[i]n enacting the SLUSA, the legislative branch must have been aware of the interpretation of section 10(b) of the 1934 Act, which recognized causes of actions for the nonpurchase or nonsale of securities were not covered by the 1934 Act and state law would fill those gaps." *Gutierrez v. Deloitte & Touche, L.L.P.*, 147 F. Supp. 2d 584, 595 (W.D. Tex. 2001); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598 (8th Cir. 2002) (virtually identical language). Thus,

> SLUSA only converts into federal claims those state claims that fall within its clear preemptive scope, thereby confining federal question jurisdiction under this statutory regime to a subset of securities fraud cases. Congress was mindful to preserve the balance between establishing and maintaining "national standards for securities class action lawsuits involving nationally traded securities" and "preserving the appropriate enforcement powers of state securities regulators. . . ." This balance was achieved by expressly confining SLUSA preemption and removal to lawsuits in which the plaintiff alleges a state law violation stemming from (for purposes of this suit) "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."

Spielman, 332 F.3d at 124 (citations omitted).